Supreme Court, U.S.
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No. 99-1858

IN THE

Supreme Court of the United States

FRATERNAL ORDER OF POLICE, LODGE #20,

Petitioner,

v.

UNITED STATES OF AMERICA; CITY OF MIAMI; and BOARD OF TRUSTEES OF THE CITY OF MIAMI FIREFIGHTERS AND POLICE OFFICERS RETIREMENT TRUST,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CITY OF MIAMI

ALEJANDRO VILARELLO
City Attorney
MYRNA D. BRICKER*
Assistant City Attorney
444 S.W. 2nd Avenue
Suite 945
Miami, Florida 33130
(305) 416-1800

Attorneys for Respondent City of Miami

* *Counsel of Record*

161034

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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I

STATEMENT OF THE CASE

Since 1977, the City of Miami Police Department has promoted police officers in accordance with the promotional goals of a court-approved consent decree designed to eliminate the effects of past discriminatory practices against blacks, Hispanics and women in the workforce. (App. 44). In 1979, in furtherance of these goals, the City amended its civil service rules by adopting Ordinance No. 8977. This rule changed the procedure for promotions from one based strictly on test scores to a more flexible system that provided a greater opportunity for the promotion of qualified minority candidates. (App. 71-76).

In 1993, Petitioner, the Fraternal Order of Police, Lodge #20 ("FOP 20"), brought two motions to hold the City of Miami in civil contempt of the consent decree for discriminating on the basis of race against white and Hispanic police officers in promoting certain black police officers to the rank of lieutenant and sergeant. The FOP 20 contended that in 1992 the City applied Civil Service Rule 8.7 (Sec. 40-88(e)(2), Miami City Code; App. 75) as a pretext for promoting additional black officers over white or Hispanic officers. The facts and circumstances which gave rise to the contempt motions, the historical context in which they occurred and the applicable civil service rules are set forth in detail by the Court of Appeals as an integral part of its decision. (App. 3-7).

The United States of America joined the City of Miami in contesting the motions. No evidentiary hearing took place. Based on stipulated facts and written memoranda, the district court determined that the City's "special certification" of certain minority candidates for promotion to police lieutenant

and police sergeant was discriminatory. The district court held the City in civil contempt of the consent decree and awarded broad "make whole" relief in the form of retroactive promotions, back pay, seniority, pension rights and other monetary benefits to a total of ninety-five police officers whom the district court described as those "adversely affected." [1]

The United States of America and the City of Miami appealed, challenging only the relief granted by the district court, contending: (a) that the district court's remedy was overly broad and excessive in light of the undisputed evidence which showed that the City's discriminatory action resulted in the unlawful promotion of a single black lieutenant and a single black sergeant and that no more than a total of thirty-five officers were adversely affected; (b) that the district court abused its discretion in awarding full compensatory "make-whole" relief to an entire class of police officers as if each of the officers would have received one of the two promotions, when, in fact, there was a much smaller group of identifiable candidates who actually competed for the two vacancies and stood a fractional chance of being promoted; and (c) that the remedy fashioned by the district court, which would have cost the City of Miami several

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1. Although the district court's order does not define the "adversely affected" officer class, the order may be read to include as many as 72 officers to whom the district court awarded retroactive promotions, back pay, and other compensatory relief with respect to the sergeant promotions and an additional 23 officers to whom the district court awarded similar relief with respect to the lieutenant promotions. (App. 28, 30-32). On appeal, the Eleventh Circuit clarified the district court's order and restricted the class to the twenty-three lieutenant and twelve sergeant officers who were actually harmed by the City's discriminatory practice.

million dollars to implement, was so punitive in its effect as to constitute an unlawful sanction for civil contempt.

On appeal, the Eleventh Circuit Court of Appeals concluded that the district court's remedy was excessive and resulted in an unfair and sweeping windfall to the officer class. (App. 18). The Court of Appeals determined that the district court should have relied on a variant of the pro rata method for computing class-wide remedial relief, where only two vacancies were illegally filled by the City's discriminatory selection process and where there were two identifiable groups of candidates who actually competed for each promotion (App 15), and that the amount awarded by the district court so exceeded the monetary value of the lost promotions that the "compensatory" civil contempt sanction was punitive in effect. (App. 19-20). The Court of Appeals vacated the award and remanded the matter to the district court to award each certified officer candidate who actually stood a fractional chance of being promoted a pro rata share of the monetary value of the promotion for which he was eligible. (App. 20-21).

The FOP 20's petitions for rehearing and rehearing en banc were denied. (App. 63).

REASONS FOR DENYING THE WRIT

I.

NEITHER THE RECORD NOR THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS RAISES THE QUESTIONS PRESENTED BY THE PETITION.

The Eleventh Circuit's decision is plainly correct and consistent with the policy and purpose of "make-whole" relief under Title VII. The decision is not in conflict with any decisions of this Court, decisions of the former Fifth Circuit Court of Appeals or of other circuit courts as to the fashioning of "make-whole" relief, whether the relief is to compensate a class of victims of illegal discrimination in the context of a Title VII case, or whether the make-whole relief is used, as it was in the instant case, as a model for assessing an appropriate compensatory sanction in a case of civil contempt for violation of a court-ordered affirmative action plan.

There is nothing in the record to support Petitioner's premise that "an entire class of employees with higher test scores was excluded from consideration for promotion solely on the basis of race." Furthermore, the premise is false, as under the operative civil service rules, promotions were not based on test scores. Yet, this is the unfounded premise upon which Petitioner constructs the second question presented in the petition. Further, Petitioner's assertion on page 4 of the petition that the City "engaged in a policy and practice of reserving specific promotional spots solely for members of a particular race . . ." is grossly inaccurate and misleading. The City's discriminatory act was an isolated occurrence

involving two promotions made in 1992. No illegal city "policy" or "practice" was ever demonstrated. Similarly, the statement of Petitioner that promotional spots were "set aside" or "reserved" on the basis of race is also inaccurate. The undisputed facts in the record refute the notion that the City engaged in any form of racially-based "set asides."

The record demonstrates unequivocally that the City's unlawful "special certification" of additional black candidates and/or Haitian/Creole-speaking candidates did not deprive a single eligible sergeant candidate or lieutenant candidate from being added to the pool of certified, eligible candidates for promotion. The sole effect of the "special certification" was to increase by two or three officers the number of certified candidates who competed for the two slots. By awarding relief to a large number of applicants whose names appeared on the promotional register by virtue of their having passed the promotional exam, but who were not and would not have been eligible to compete for the available slots regardless of the City's wrongful "special certification", the district court impermissibly awarded remedial relief to some 60 officers who were not harmed in any way by the discrimination.

Even if the district court's order can be read to encompass a more limited class of 35 officers, the district court abused its discretion in awarding a remedy which treated each candidate who competed for the two vacancies as if he had a one hundred percent probability of receiving a promotion, when, in fact, each candidate for promotion to lieutenant stood only a one in twenty-three chance of being selected, and each candidate for promotion to sergeant stood only a one in twelve chance of being selected. The district court's award was grossly excessive, as it placed the officers

in the class in a substantially better position than they would have occupied had the discrimination not occurred.

In vacating the district court's order as to the sweeping remedial relief awarded to the entire class of officers and in directing the district court on remand to award each certified officer candidate a pro rata share of the monetary value of the promotion for which they were eligible, the Eleventh Circuit adhered to the purpose of "make-whole" relief under Title VII, that is, to "recreate the conditions and relationships that would have been had there been no 'unlawful discrimination.' " *See International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372 (1977) (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976)). The Eleventh Circuit's decision is also consistent with established policy behind § 706(g) of Title VII that "make-whole" relief should be provided only to those who have been actual victims of illegal discrimination. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 579-80 (1984).

Moreover, the Eleventh Circuit correctly rejected the classwide remedial relief awarded by the district court as an excessive sanction for civil contempt. As the Court of Appeals noted, the amount awarded by the district court so far exceeded the monetary value of the lost promotions (eighteen times greater than the actual value of the two lost promotions), the award was punitive in its effect and inappropriate for a civil contempt sanction. *See International Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 828 (1994). (App. 19).

II.

THE ELEVENTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH *TAXMAN v. BOARD OF EDUCATION* OR WITH DECISIONS OF THE FORMER FIFTH CIRCUIT AS TO AN APPROPRIATE COMPENSATORY REMEDY FOR THOSE POLICE OFFICERS ACTUALLY ADVERSELY AFFECTED BY THE CITY'S ACTION.

Petitioner contends that since it was impossible to determine which class members would have been promoted absent the City's discrimination, full compensatory classwide relief to as many as 72 applicants for sergeant promotions and 23 applicants for lieutenant promotions was appropriate and within the sound discretion of the district court. As authority for this contention Petitioner relies on *Taxman v. Board of Education*, 91 F.3d 1547 (3d Cir. 1995), *United States v. United States Steel Corp.*, 520 F.2d 1043 (5th Cir. 1975) and *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). Petitioner's reading of those cases is simplistic and inaccurate. Furthermore, far from departing from the important principles of "make-whole" relief established in the former Fifth Circuit cases, the Eleventh Circuit espouses those principles and applies them correctly to the facts of the instant case. Petitioner attempts to create a conflict where there is none.

First, the distinction should be noted that *Taxman*, *United States Steel* and *Pettway* are all actions adjudicated under the Civil Rights Act of 1964, § 706(g) as amended 42 U.S.C.A. § 2000e-5(g), and do not involve the fashioning of a compensatory remedy for civil contempt. In fashioning remedial relief for the victims of discrimination under Title

VII, neither the Third Circuit in deciding *Taxman*, nor the former Fifth Circuit in deciding *United States Steel* or *Pettway* was constrained by the rule of law that a sanction for civil contempt must be strictly compensatory in character, and not punitive. *See International Union, United Mine Workers v. Bagwell*, 512 U.S. at 828. While "make-whole" remedies generally available to victims of illegal employment discrimination under Title VII may have provided a valid model for fashioning a remedial sanction for civil contempt in this case, the district court was nonetheless required by law to limit the sanction which it imposed on the City to the actual economic damage caused by the offensive conduct. It failed utterly to adhere to such limitation. The Eleventh Circuit's remedy corrects the district court's error in this regard.

Furthermore, the Eleventh Circuit's decision to reject the district court's award of full remedial relief to the entire class and to prescribe a pro rata methodology for computing appropriate classwide relief in the instant case is in all respects consistent with the precedent established by the former Fifth Circuit's decisions in *United States Steel* and *Pettway*. (App. 16)[2]. Indeed, in *United States Steel* the former Fifth Circuit endorsed just such a methodology for fashioning a classwide remedy when a court could not differentiate between class members. As the Eleventh Circuit notes:

> In the past, we have recommended this specific [pro rata] method when, even after reasonable effort, a court is unable to differentiate

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2. Decisions by the former Fifth Circuit prior to September 30, 1981, are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

> between class members for remedial relief purposes. *See United States Steel*, 520 F. 2d at 1055-56. In United States Steel, the former Fifth Circuit "commended" to the district court a pro rata methodology where there was a clear proof of systematic race discrimination against a large class of black steelworkers but an unclear methodology for determining which specific individuals deserved backpay relief. *See United States Steel*, 520 F.2d at 1055-56. (App. 16-17).

The Eleventh Circuit's decision also follows the principle established in *Pettway* that classwide remedies must strive for equity to both parties (App. 15), and that the "key is to avoid both granting a windfall to the class at the employer's expense and the unfair exclusion of claimants by defining the class . . . too narrowly." (App 15) (quoting *Pettway*, 494 F.2d at 262 n.152).

The Eleventh Circuit's decision is in accord with decisions of several other circuit courts of appeal which have recommended the pro rata method in similar circumstances. *See Dougherty v. Barry*, 869 F.2d 605, 614-15 (D.C. Cir. 1989); *Ingram v. Madison Square Garden Center, Inc.*, 709 F.2d 807, 812 (2d Cir. 1983); *Hameed v. International Ass'n of Bridge, Structural, & Ornamental Iron Workers, Local Union No. 396*, 637 F. 2d 506, 519-21 (8th Cir. 1980); *Stewart v. General Motors Corp.*, 542 F.2d 445, 452-54 & n.7 (7th Cir. 1976). (App. 16-17).

As the Court of Appeals points out (App. 16 n.5), *Taxman* is the "exception to the rule", readily distinguishable on its facts. Unlike the more typical case in which a large class is competing for a limited number of positions, *Taxman*

involves two teachers of equal seniority and merit, one black and one white, who competed for a single position when the school board was forced to lay off one of the teachers. The school board impermissibly used race to break the tie and laid off the white teacher. The Third Circuit upheld full back pay relief to the teacher who had been laid off, determining that 100% back pay was the appropriate way to restore her to a position of financial equality with the black teacher who retained the job.

The Eleventh Circuit considered *Taxman* and rightly concluded that in contrast to a situation involving just two individuals, where each stood a 50% chance of retaining the position, "the nexus between thirty-five candidates and only two promotion slots [was] far too disproportionate to sustain full remedial relief for the entire class." (App. 19). The Court of Appeals reasoned further that the pro rata method employed in *Dougherty v. Barry* and other circuit court decisions was fairer and more consistent with "the unambiguous goal of 'make-whole' relief . . . to compensate persons who have actually suffered from unlawful discrimination for their actual compensatory losses." (App. 19). In addition, the pro rata method of compensating the class of police officers actually affected by the City's discrimination avoided granting a windfall to the employee class at the employer's expense. (App. 15).

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

ALEJANDRO VILARELLO
City Attorney
MYRNA D. BRICKER*
Assistant City Attorney
444 S.W. 2nd Avenue
Suite 945
Miami, Florida 33130
(305) 416-1800

Attorneys for Respondent
City of Miami

* *Counsel of Record*